

SECRETARY OF LABOR,

Complainant,

v.

BIRD ROOFING & WATERPROOFING  
COMPANY, and its successors,

Respondent.

OSHRC DOCKET NO. 99-0228

**APPEARANCES:**

For the Complainant:

Alan M. Raznick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California

For the Respondent:

Tony F. Reyes, Jr., Bird Roofing and Waterproofing, Inc., Oxnard, California

Before: Administrative Law Judge: Benjamin R. Loye

**DECISION AND ORDER**

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Bird Roofing & Waterproofing Company, and its successors (Bird), at all times relevant to this action maintained a place of business at Building 1600, Edwards Air Force Base, where it was engaged in roofing. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On September 10, 1998 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Bird's Edwards AFB work site. As a result of that inspection, Bird was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Bird brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On August 10, 1999, a hearing was held in San Bernardino. The parties have submitted briefs on the issues and this matter is ready for disposition.

### Alleged Violations

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8m) or more above a lower level were not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:

(a) Edwards Air force Base, Building #1600 - Employees working on the edge of the roof without any fall protection. There was more than a 30 feet drop to the ground level from the roof.

*BIRD ROOFING & WATERPROOFING COMPANY was previously cited for a violation of this Occupational Safety and Health standard or its equivalent standards. The equivalent standard was 29 CFR 1926.501(b)(10) which was contained in inspection number 109508689 and issued as citation number 1 item number 2. The other equivalent standard was 29 CFR 1926.501(b)(11) which was contained in inspection number 102493871 which was issued as citation number 1 item number 2. These were issued on 5/5/97 for work places at Vandenburg AFB, California.*

### Facts

On September 10, 1998, Jerry Betro, an OSHA Compliance Officer (CO) conducted an inspection of the construction site at Edwards AFB (Tr. 18). Betro testified that as he approached building 1600 with Tech Sergeant Dwayne Allan, and Larry Smith, an Air Force occupational safety and health manager (Tr. 80), they noticed and photographed three or four employees walking near the edge of the roof (Tr. 19, 22, 47; Exh. C-1). None of the workers appeared to be using fall protection (Tr. 47). Betro testified that they were about 100 to 150 feet away from the building when they noticed and began photographing the workers (Tr. 22). They were approximately 75 to 100 feet away when the final photographs were taken (Tr. 43). Betro stated that they observed the employees on the roof for seven to ten minutes as they drove up to the building (Tr. 45). Betro testified, however, that by the time they located the primary contractor, Valenzuela, all the workers had left the roof (Tr. 19, 72). Valenzuela's supervisor told Betro that the men on the roof were employees of Bird Roofing, and gave Betro their names (Tr. 20-21, 49).

The roof of building 1600 is flat, and has a 12-14" lip at the edge (Tr. 44, 71, 77). Betro testified that the employees were all moving along the edge approximately a foot from the lip when he first saw them (Tr. 47, 78). In the photographs, however, the workers appear to be loading material onto the forklift (Tr. 32, 38, 74). Complainant's exhibits show one employee standing behind a pallet on the tines of a forklift, well away from the edge; Betro testified that, in his position behind the pallet, the employee was not exposed to a fall hazard (Tr. 29, 45, 71; Exh. C-1). A second employee is pictured standing to the right of the pallet; Betro testified that this employee was exposed to a fall to

the ground of at least 30 feet as he walked along the edge of the building (Tr. 29, 45, 47; Exh. C-1). A shadow, which Betro identified as a third employee, is pictured near the “high bay structure,” well away from the edge (Tr. 29; Exh. C-1, C-4).

Larry Smith generally corroborated Betro’s account of the inspection. Smith, however, did not testify to seeing the men engaged in any activity other than loading the pallet (Tr. 83-84, 87-89). Smith admitted that he could not judge the workers’ proximity to the edge at that distance (Tr. 83). Smith estimated that the closest man was within four feet of the edge (Tr. 84, 96).

Tech Sergeant Allen testified similarly, stating that from 100 to 150 feet away he could see three or four workers who appeared to be loading a pallet on a forklift (Tr. 103, 119). Allen testified that the employee standing to the right of the pallet was closest to the edge; he estimated that the worker was approximately two feet from the edge of the roof (Tr. 104, 120).

Tony Reyes, Bird’s safety officer, testified that the job at Edwards AFB was not scheduled to begin until three weeks after the OSHA inspection date, and that Bird was on the work site on September 10, 1998 only at Valenzuela’s request. Reyes testified that the primary contractor had contacted Bird at short notice, asking that it temporarily seal the roof in advance of predicted rains (Tr. 125). Reyes testified that the repair job was a one day project (Tr. 126). The roofers were sealing holes that were at the center of the building and never worked within six feet of the edge of the roof (Tr. 126). Reyes testified that at the time of the OSHA inspection the job had been completed, and the workers were removing their gear from the roof (Tr. 127, 129). Reyes admitted that one employee appears to have been standing near the edge of the roof to direct the forklift operator (Tr. 127-28).

### Discussion

The cited standard provides:

Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Bird does not contest the violative conditions themselves, but argues that Title 8, §1669, Subpart 4 of Cal-OSHA’s Construction Safety Orders specifically provide for the suspension of fall protection requirements when the work is of short duration (i.e., non-repetitive) and exposure is limited “if adequate risk control is recognized and maintained under immediate, competent supervision.” In addition, Bird raises the affirmative defense of “greater hazard.”

### Cal-OSHA Standards

According to California's approved state plan, found at 29 CFR §1952.170 *et seq.*, the Federal Occupational Safety and Health Administration will continue to exercise authority with regard to "private contractors on Federal installations where the Federal agency claims exclusive Federal jurisdiction. . ." *See*, §1952.172(b)(3). Bird stipulates that OSHA properly exercised its jurisdiction over the construction work site at Edwards AFB (Tr. 14). Where Federal OSHA standards govern a work site, conflicting state regulation is preempted. *See, Gade v. National Solid Wastes Management Ass'n.*, 505 U.S. 88 (1992) [where the Supreme Court found that "Congress intended to subject employers and employees to only one set of regulations, be it federal or state." *Id.* at 99.]

Cal-OSHA's Construction Safety Orders are inapplicable here, where the cited work place was located on a Federal installation under Federal jurisdiction. This matter is governed exclusively by the cited Federal standard.

### Greater Hazard

In its post-hearing brief, Bird argues that its employees were incapable of determining the strength of the air conditioning ducts on the cited roof. Bird maintains that using the ducts as anchorage points for employees' personal arrest systems would pose a greater risk to its employees.

In order to establish the affirmative defense of a greater hazard, the employer must show that 1) the hazards of compliance are greater than the hazards of non-compliance; 2) alternative means of protection are unavailable; and 3) an application for a variance would be inappropriate. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991-93 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991).

Bird's bare assertion that the air conditioning ducts may have been insufficient to withstand the force exerted by a falling employee is insufficient to establish the greater hazard defense. Bird's speculation about the adequacy of the ducts as anchorage points is nothing more than that. Moreover, Bird fails to address the availability of alternative means of protection such as guardrails and warning lines. Finally, Bird offers no explanation for its failure to apply for a variance.

Bird has failed to prove its affirmative defense.

### Penalty

The Secretary proposes a penalty of \$4,000.00 for this item. The violation is properly characterized as a "repeat" violation, in that Bird was cited on two previous occasions for failing to comply with OSHA fall protection requirements (Exh. C-2, C-3).

CO Betro testified that in calculating the proposed penalty, he took into account Bird's size, good faith, and prior history (Tr. 67).

The gravity of the violation was overstated, however, in that the likelihood of an accident occurring was low. The roof in question was flat. No roofing work was actually being performed at the time of the observed exposure, which was less than 10 minutes. Only one employee was seen in the zone of danger; moreover, because the compliance officers were between 75 and 150 feet from the alleged violation, it was unclear how near the edge of the roof the exposed employee was, or what he was doing. Reyes' testimony that the exposed employee was directing the forklift operator was uncontroverted. While engaged in that activity, the employee would have been aware of his proximity to the edge.

Taking the relevant factors into account, I find that a penalty of \$800.00 is appropriate.

**ORDER**

1. Citation 1, item 1, alleging violation of §1926.501(b)(1) is AFFIRMED, and a penalty of \$800.00 is ASSESSED.

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Benjamin R. Loye  
Judge, OSHRC

Dated: